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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 323



JOE W. BUICE, Petitioner

v.

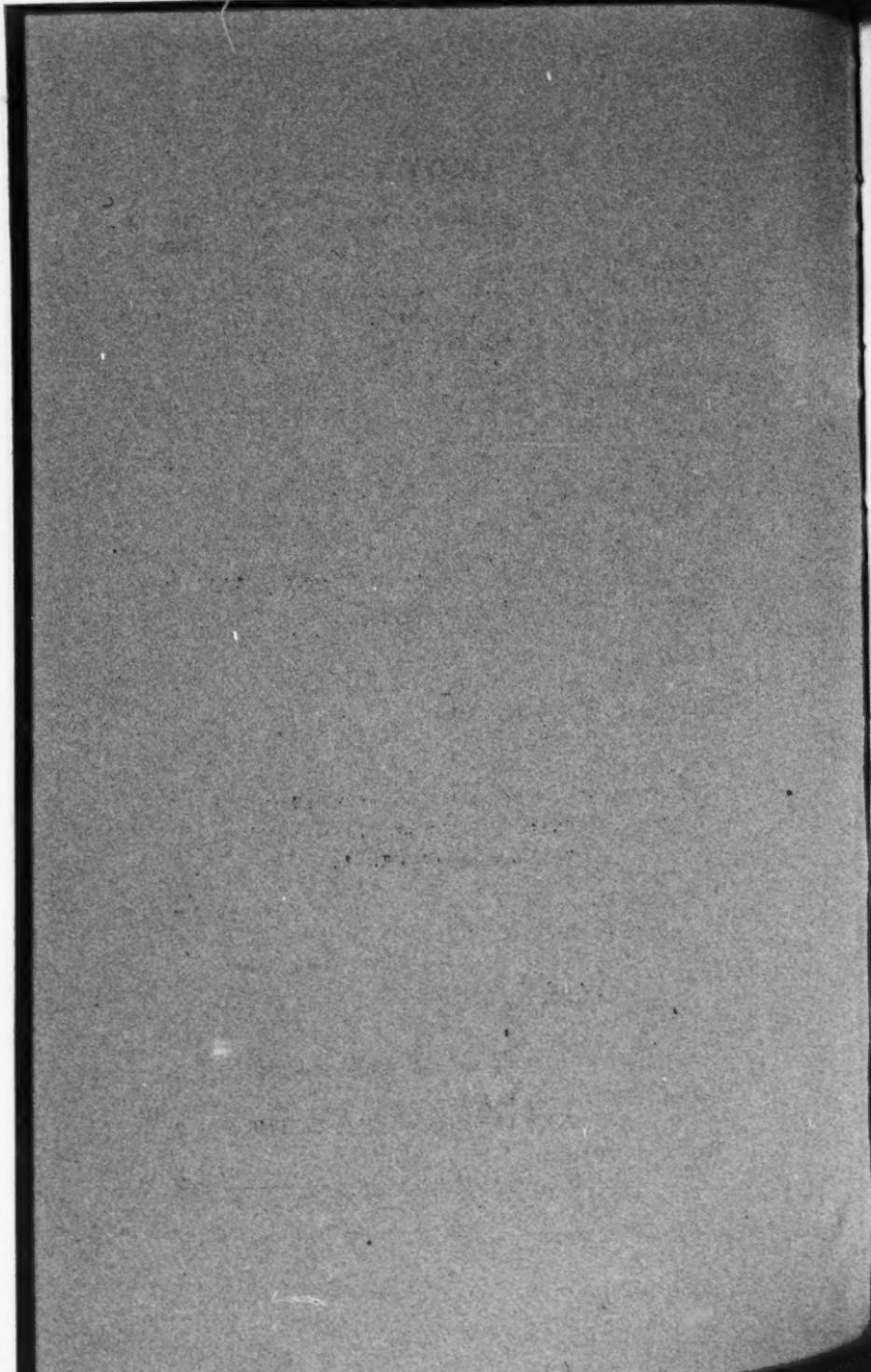
**COLONEL HOWARD S. PATTERSON ET AL.,
Respondents**



ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

**Petitioner's
PETITION FOR REHEARING**

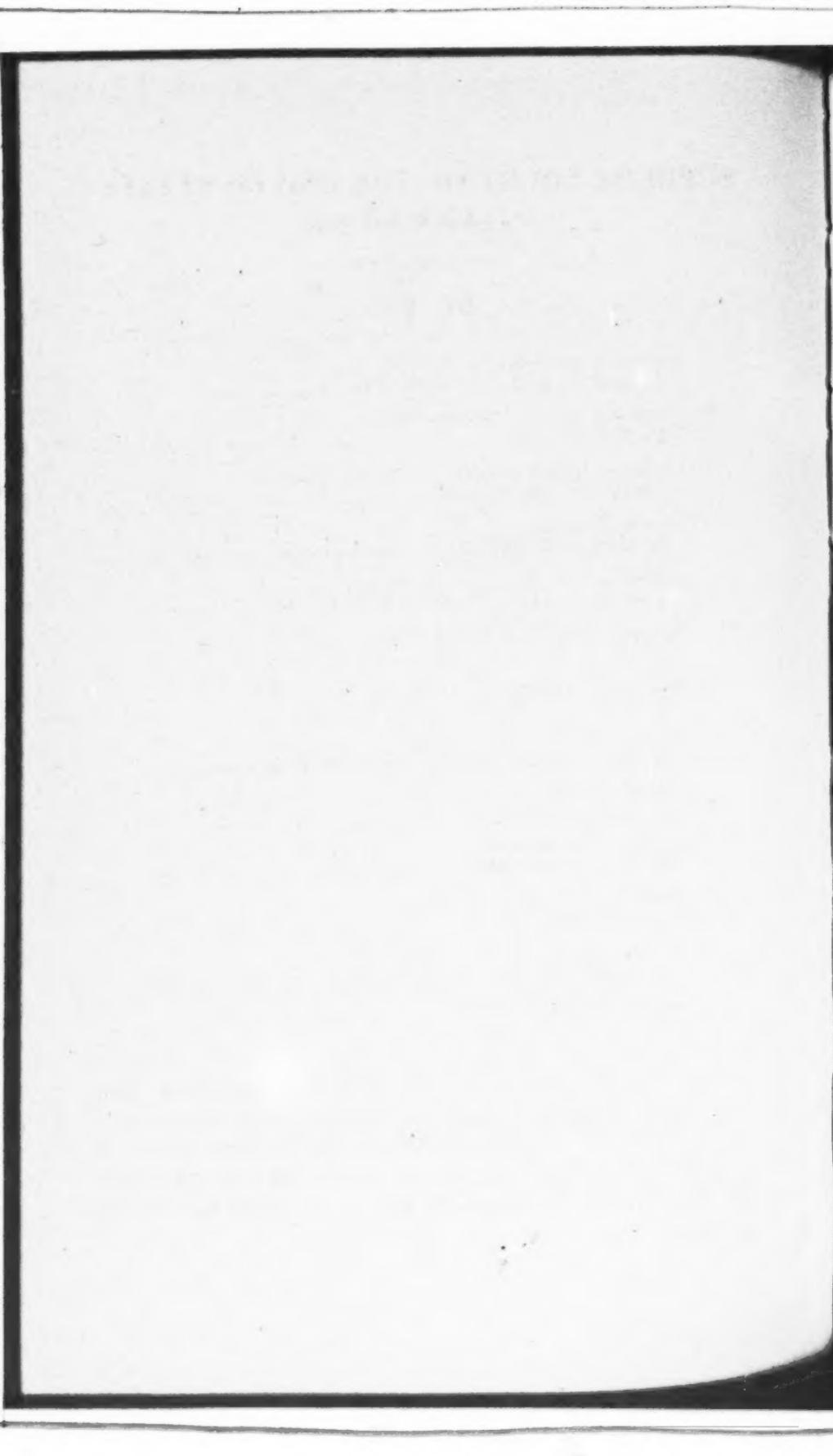
**ALFRED A. ALBERT
HAYDEN C. COVINGTON
Counsel for Petitioner**



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ON PETITION FOR WRIT OF CERTIORARI TO THE
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MAY IT PLEASE THE COURT:

Within the time fixed by rules of court, petitioner files and presents this petition for rehearing. The court is requested to grant the same and order the petition for a writ of certiorari granted, for the reason that an important matter urged upon the court has been overlooked in arriving at its decision.

Grounds

ONE

This court committed error in refusing to grant the writ of certiorari for each and every one of the reasons stated in the petition for the writ.

TWO

This court committed error in refusing to review the decision of the court below because of the dangerous doctrine announced by the court below, that the undisputed testimony of the petitioner may be rejected and his petition for the writ of habeas corpus dismissed because of his interest in the outcome of the proceedings.

ARGUMENT

Discussion and Reasons Supporting Petition

The court is respectfully referred to the argument appearing in the brief supporting the petition, pages 13-28.

Moreover, the court's attention is directed to the fact that the decision of the court below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Lawrence v. Yost*, — F. 2d —, decided June 27, 1946. The Government, on substantially the same facts as those presented in this case, has failed to petition this court for a writ of certiorari. The decision in the *Yost* case stands unreviewed and in irreconcilable opposition to the holding of the court below in this case. Compare *United States ex rel. Kulick v. Kennedy* (CCA-2), — F. 2d —, decided October 29, 1946; also, opinion of LEARNED HAND, C. J., delivered October 31, 1946, in *United States v. Balogh* (CCA-2).

Furthermore, the court below passed upon a substantial question of federal law, which has not been but which should

be decided by this court, when it ruled that the interest of the petitioner was sufficient to warrant dismissal of his petition for writ of habeas corpus, because his testimony was uncorroborated by other testimony. Testimony on the part of the petitioner was not discredited. It was not contradicted. It was not impeached. It was not improbable. There were witnesses who were available to the Government and who were not called to contradict the testimony of the petitioner.

It has been held that the testimony of a party is not to be discredited where it is uncontradicted, unimpeached, not improbable and there are witnesses who might be called to contradict his testimony in any particular. (*Rosseau v. Hollenbeck*, 1906, 97 N. Y. S. 394; *Rostron v. Rostron*, 1928, 49 R. I. 292; *Lacy v. Wilson*, 1872, 24 Mich. 479; *Matthews v. Lanier*, 1878, 33 Ark. 91; cf. *Andrew v. Goodale*, 85 N. H. 510.) "The rule invoked, it seems to us, ought not to be applied when the fact testified to is one which the opposing party is able, as in the case just referred to, to introduce testimony to contradict, and fails to do so." *Missouri K. & T. Ry. v. Stone*, 1910, 58 Tex. Civ. App. 480, 125 S. W. 587.

It has been held that a liberal presumption ought to be indulged in favor of the one party where the other party fails to produce evidence. (*Wetmore v. Rymer*, 169 U. S. 115) It is well settled that if a party fails to produce the testimony of available witnesses on a material issue, it may be inferred that the testimony of the witnesses, if presented, would be adverse to the party who fails to call the witness. *Mammoth Oil Co. v. United States*, 275 U. S. 13; *Graves v. United States*, 150 U. S. 118; *Culbertson v. The Southern Belle*, 18 How. (U. S.) 584; *The New York*, 3 Wheat. (U. S.) 54; *Stocker v. Boston & M. R. Co.*, 84 N. H. 377; *Bethlehem Steel Co. v. N. L. R. B.*, 74 App. D. C. 52, 120 F. 2d 641; *Tully v. Fitchburgh R. Co.*, 1883, 134 Mass. 499.

The testimony of the petitioner is so consistent and

sound, being unimpeached and undiscredited, that the court below abused its judicial power in discarding his testimony as unworthy of belief because of his interest in the outcome of the proceedings, and for that reason affirming the judgment of conviction.

Conclusion

WHEREFORE, petitioner prays, as in his petition for the writ of certiorari, that the writ be granted, that the cause be set down for argument and submission, and that upon due consideration the judgment of the court below be reversed and the cause remanded to the trial court for proceedings not inconsistent with the judgment and decision to be rendered herein.

Respectfully submitted,

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November 1, 1946

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

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Counsel for Petitioner